IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-283

PAUL R. BUTE, WILLIAM FEDOR,
GEORGE DAVID DE PEDER, RAYMOND G. PATRAS,
THOMAS R. BURNS, RUSSELL J. LEAVY
BERNARD J. SCHROEDER and JAMES JAEGER,
Petitioners,

v.

ROBERT J. QUINN, as Fire Commissioner for the
City of Chicago, Illinois, and WILLIAM E. CAHILL,
REGINALD DUBOIS, QUINTON J. GOODWIN and
CHARLES A. POUNIAN, as Members of the
City of Chicago Civil Service Commission, and
THE CITY OF CHICAGO, ILLINOIS,
a Municipal Corporation,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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962-8745

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ROBERT P. DANK, on behalf of Petitioners, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above case on May 28, 1976.

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Illinois, Eastern Division, (Appendix A, *infra*), and the opinion of the United States Court of Appeals for the Seventh Circuit (Appendix B, *infra*), have not been reported.

JURISDICTION

This civil action was commenced in the United States District Court for the Northern District of Illinois, Eastern Division on May 7, 1975. The complaint sought declaratory and injunctive relief and an award of money damages. By order entered September 4, 1974, the District Court granted Defendants' Motion for Dismissal pursuant to FR Civ P 12 (b) (6). Petitioners filed a timely Claim of Appeal on October 3, 1975. The Court of Appeals for the Seventh Circuit announced its decision from the bench after Petitioners' oral argument on May 28, 1976 and ordered that a judgment be entered affirming the opinion and order of the District Court, from which Petitioners petition this Court for a Writ of Certiorari.

Jurisdiction is conferred on this Court pursuant to 28 USC 1254 (1), this being a petition to review a judgment or decree of the Court of Appeals.

QUESTIONS PRESENTED FOR REVIEW

1. DOES a requirement that a municipal employee maintain residency within the city limits as a condition of employment which provides no exception procedure or status to those for whom compliance becomes impossible after long standing employment, violate the Due Process clause of the Constitution?

2. IS a municipal employee residency requirement void as a denial of Due Process of law where it operates to destroy the freedom of choice of employees, their spouses and children, in basic matters of marriage, home and family life?

3. IS a municipal employee residency requirement void where it is not rationally related to any legitimate interest of the city in providing quality municipal services?

4. IS a municipal employee residency requirement unconstitutional where its claimed necessity is far outweighed by its destructive impact on individual rights and liberties guaranteed by the Fourteenth Amendment?

5. IS the residency requirement of the City of Chicago unconstitutional in that it is vague and overbroad both on its face and applied?

6. ARE the classifications created by the Chicago Residency Ordinance void as a denial of Equal Protection of the Laws?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourteenth Amendment to the Constitution of the United States.

This case also involves 25 Chicago Municipal Code §30 which mandates residency as a condition of employment with the City of Chicago:

> All officers and employees in the classified civil service shall be actual residents of the city. Any officer or employee in the classified civil service of the city who shall fail to comply with the provisions of this section shall be discharged from the service of the city in the manner provided by law.

Also involved are two sections of the Chicago Fire Department Rules and Regulations which provide for discharge for the following offenses:

> §61.013. Violation of any law or ordinance.
>
> §61.030. Failure to reside within the corporate boundaries of the City of Chicago.

and one section contained within the "General Rules and Regulations" section of the Chicago Fire Department Rules and Regulations:

> §51.116. Members shall promptly notify their superior officers of a change of their residence or home telephone number. These changes shall be reported in writing and forwarded, through channels, to the Fire Commissioner. Members of the Department shall live within the corporate limits of the City of Chicago and be a bona-fide resident thereof.

STATEMENT OF THE CASE

On May 7, 1975, the eight individually named Plaintiffs brought this action, on behalf of themselves and the class similarly situated, seeking judgment declaring that the City ordinance and the rules and regulations of the Chicago Fire Department requiring residency within the city limits as a condition of employment are void as violative of the Equal Protection and Due Process clauses of the United States Constitution. Also sought was temporary, preliminary and permanent injunctive relief against the enforcement of the ordinance and the Departmental rules and regulations. Plaintiffs are each employees of the Chicago Fire Department, two of whom have been discharged for alleged noncompliance with

residency requirements since the inception of this action. Defendants are the Fire Commissioner of the City of Chicago Fire Department, members and the secretary of the City of Chicago Civil Service Commission and the City of Chicago. Plaintiffs' Complaint alleged that jurisdiction was predicated on 28 USC 1343, inasmuch as the action was cognizable under 42 USC 1983; it being an action brought to redress deprivation, under color of State law, of rights, privileges or immunities guaranteed by the Fourteenth Amendment. Jurisdiction was also predicated on 28 USC 1331, inasmuch as the matter arose under the Constitution of the United States and more than $10,000.00, exclusive of costs and interest, was involved in the matter in controversy for each and every named Plaintiff, and each and every member of the class.

Count I of the Complaint stated facts alleging that Defendants' proceedings to remove Plaintiffs as employees violated their procedural due process rights.

Count II stated facts alleging that the Chicago ordinance and Chicago Fire Department regulations controlling residency were, on their face and as applied, a denial of Equal Protection, in that classifications created by the Chicago ordinance were without a rational justification relating to any proper governmental function, and in that they impinged on the fundamental right to reside where one chooses and the right to travel.

Count III stated facts alleging that Plaintiffs did, in fact, satisfy all residency requirements of Defendants and that any determination to the contrary was arbitrary and capricious and therefore a denial of Due Process.

Count IV stated facts alleging that the residence requirements denied due process to Plaintiffs in that the residency requirement of the City of Chicago is vague.

Further, that the Regulations deprive each of Plaintiffs of their right to pursue the calling of their choice as firefighters of the City of Chicago while arbitrarily denying Plaintiffs a right to reasonable living conditions which are unavailable to them within the City of Chicago.

Each of the four counts of Plaintiffs' Complaint fully described facts peculiar among residency cases, which Plaintiffs intended to offer in support of the relief sought.

Defendants, on June 20, 1975, moved for dismissal of the Complaint for failure to state a claim upon which relief can be granted, pursuant to FR Civ P 12 (b) (6), or for summary judgment pursuant to FR Civ P 56. In a memorandum opinion and order entered September 4, 1975, the District Court (per the Honorable Richard W. McLaren) granted Defendants' Motion to Dismiss as to Counts II, III and IV of the Complaint, but denied the Motion to Dismiss as to Count I, the procedural Due Process claim. The District Court ordered:

> . . . plaintiffs' complaint is dismissed with respect to claims of denial of substantive due process and equal protection (the residency requirement is constitutional) but the motion to dismiss is denied insofar as plaintiffs claims are based on a purported denial of procedural due process. (Appendix A, *infra*.)

Plaintiffs filed timely Notice of Appeal on October 3, 1975, claiming an appeal from the Memorandum Opinion and Order entered by that Court on September 4, 1975, dismissing three counts of the four count Complaint. The Order of Dismissal denied the injunctive relief prayed for in Counts II, III and IV. Jurisdiction in the Court of Appeals is conferred by 28 USC 1292 (a) (1). *Converse* v. *Polaroid Corp.*, 242 F 2d 116 (CA1, 1957);

Atlantic-Richfield Co. v *Oil, Chemical & Atomic Workers Intl*, 487 F 2d 945 (CA7, 1971); *Telechron* v *Parissi*, 197 F 2d 757 (CA2, 1957); *Allico Nat'l Corp.* v *Amalgamated Meat Cutters & Butcher Workmen of North America*, 397 F 2d 727 (CA7, 1968); *Build of Buffalo* v *Sedita*, 441 F 2d 284 (CA2, 1971); *Abercrombie & Fitch* v *Hunting World, Inc.*, 461 F 2d 1040 (CA 2, 1972).

Upon learning that the Civil Service Commission had thereafter ordered the discharge of two of the Plaintiffs for non-compliance with these residency requirements, Plaintiffs applied to the District Court for a preliminary injunction or, in the alternative, injunction pending the appeal to the Court of Appeals. Hearings were then conducted on these motions. The motions for the injunction were denied. An appeal to the Court of Appeals from the denial of the injunctive relief was filed, but allowed to be dismissed for lack of progress.

Appeal of the Order of Dismissal was argued in the Court of Appeals for the Seventh Circuit on May 28, 1976. Petitioners argued that the residency requirement impinged upon their right not to have to sacrifice their marriages for the sake of continuing their municipal employment; that the requirement worked an infringement on their right to select a home with and for their spouses and children; and that the total lack of exception or variance provisions in the unusual Chicago residency requirement was arbitrary and unreasonable when applied to firefighters whose compliance is or became impossible. The Court of Appeals, after hearing oral argument only from counsel for Petitioners, announced its decision affirming the Order of Dismissal and instructed the Clerk to enter an order

accordingly. Pronouncement from the Court of Appeals held that such affirmance was required by the holding of *McCarthy* v *Philadelphia Civil Service Commission*, ___ US ___, (1976) and that the arguments of Petitioners were subsumed by matters which must have been considered by this Court in *McCarthy*. Petitioners thereupon timely filed this Petition for Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

1. More than eleven million Americans are currently employed by governmental or public employers.[1]

This Court has profoundly stated that governmental employers have different rights, duties and obligations relating to employees than do private employers.

A pronounced difference is found in the fact that governmental employers have a right to condition public employment on the residency of an employee, his or her spouse and children within the neatly drawn geographical boundaries of that governmental unit. In the present case the Court of Appeals upholds the right of Chicago to bind the employee and all those touching his private residence without variance or exception. That a private employer could require, of an employee, under penalty of discharge, that *he (or she) and the family* live, shop, worship, attend school, vote, own property and transact business only in a "company town" is outrageous and shocking to our collective conscience. Yet, for the millions of public employees now shackled by residency requirements, the outrageous "company-town" concept is not a ludicrous anachronism, but rather a real and present living-hell.

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[1] Statistical Abstract of the United States 1975, at 272.

Petitioners concede that the Respondent boundary-bound City has substantial concerns in its fight against urban decay, but contend that the City's fight cannot be fought with the wives and children of faithful employees as the proscripted militia in the war.

Career firefighters of the City of Chicago are caught in a hopeless dilemma. They are forced to choose between giving up their economically-required, long-standing employment with the city, or destroying their marriage and family life. Two employees, having 25 and 15 years of seniority, respectively, have now lost their careers. Wholesale firings are threatened against other employees whose families cannot be forced into submission. Petitioners submit that the Constitution protects them from being forced into this arbitrary and unreasonable choice. Petitioners pray this Court grant their Petition for a Writ of Certiorari so that the decision of the Court of Appeals be reviewed and this question of fundamental importance to federal law be settled by this Court.

The Court of Appeals has stated:

> Counsel contended that certain rights of appellant firemen employees were not considered in *McCarthy*, *i.e.*, the right not to have to sacrifice one's marriage and the right to select a home; that the lack of an exception for hardship cases renders a residency ordinance unconstitutional. These are all, however, subsumed in the matters which clearly must have been considered by the Supreme Court in *McCarthy*. (Appendix B).

Petitioners submit that the only issue before this Court in *McCarthy* v *Philadelphia Civil Service Commission*, ___ US ___ (1976), was correctly posed by this Court as:

> He (McCarthy) challenges the constitutionality of the regulation and the authorizing ordinance as violative of his federally protected right of interstate travel. ___ US at ___.
>
> and
>
> We have not, however, specifically addressed the contention made by appellant in this case that his constitutionally recognized right to travel interstate as defined in *Shapiro* v *Thompson*, 394 U.S. 618; *Dunn* v *Blumstein*, 405 U.S. 330; and *Memorial Hospital* v *Maricopa County*, 415 U.S. 250, is impaired. ___ US at ___.

Nowhere in *McCarthy's* Jurisdictional Statement or in this Court's per curiam Order were the questions raised by Petitioners presented to this Court or answered. Petitioners contend that the issues raised herein are new to this court, novel as applied to residency requirements of municipal employees, substantial, and worthy of a hearing on their merits.

2. The Court of Appeals has held that Petitioners' challenge to Chicago's most unusual residency requirement, based on its lack of any exception or variance status and procedure, was subsumed in the matters necessarily decided by this Court in *McCarthy*. Petitioners submit to this court that it is impossible that the issue of a lack of a hardship exception could be subsumed in the matters decided by this Court in *McCarthy*. Both the Philadelphia ordinance before this Court in *McCarthy* (§7-401(u), Philadelphia Home Rule

Charter of 1951; §20-101, Philadelphia Code of Ordinances; Philadelphia Civil Service Regulation 30.01) and the Detroit ordinance before this Court in *Detroit Police Officer's Assn.* v *City of Detroit*, 385 Mich 519, 190 NW2d 97, (1971) appeal dismissed, 405 US 950 (1972), (Ordinance 327-G) provided elaborate procedures to relieve city employees in cases of hardship incurred in their employment tenure. These cases could not have presented this question to this Court because it was not factually present in either of them. Petitioners further submit that this Court acknowledged this fact in *McCarthy* when it stated:

> The court explained that *Shapiro* and *Dunn* did not question "the validity of appropriately defined and uniformly applied bona fide residence requirements."
>
> This case involves that kind of bona fide residence requirement. ___ US at ___.

Respondents contend that the lack of an exception or variance provision in the City of Chicago residency ordinance removes it from the class of "appropriately defined" residency requirements.

The lack of an exception status or procedure renders the effect of the ordinance a "taking" of Respondents rights to the expectation of continued employment, *Perry* v *Sinderman*, 408 US 593 (1972) and/or to the freedom of choice in basic matters of marriage, home and family life, *Kelley* v *Johnson*, ___ US ___ (1976) without just compensation to those for whom compliance with the requirement is impossible or unreasonably difficult. The ordinance is an unconstitutional "taking" rather than a regulation, because it *deprives* Petitioners of valuable property and liberty rights rather than merely

restricting their exercise. The ordinance is unconstitutional, because it covers the entire time frame of the employee's work expectancy, while it makes no allowance for circumstances occuring after hire that are beyond the control of the individual, such as illness or injury of the employee, spouse, children or others dependent upon him or her, or changing financial conditions. Any of the foregoing make compliance with the regulation not merely difficult, but *impossible*.

Plaintiff-Petitioners Fedor (25 years of outstanding service) and DePeder (15 years of service distinguished by physical injury sustained in the line of duty) both sought to present evidence of the "taking" wrought upon them by changes in family matters effected with the passing of time that legislated against their strict compliance with this residency requirement.

No forum was available to them. Chicago's residency requirement is terse, iron-clad, inflexible and unconstitutional.

3. " 'Liberty' and 'property' are broad and majestic terms. They are among the '(g)reat (constitutional) concepts . . . purposely left to gather meaning from experience . . . (T)hey relate to the whole domain of social and economic fact, and the statesmen who founded this Nation knew too well that only a stagnant society remains unchanged". *National Ins Co* v *Tidewater Co*, 227 US 582, 646, 69 S Ct 1173, 93 L Ed 1556, 1596 (Frankfurter, J., dissenting), quoted with approval in *Board of Regents* v *Roth*, 408 US at 571.

Petitioners seek to strike a relationship between the seniority-accumulated "property" right they have come to enjoy in the expectation of continued public employment and their fundamental "liberty" of choice in matters of family life, and the meaning of this expressed concept. To this end, the question of this case transcends the issues raised in *McCarthy*.

This Court, in its holdings, has brought within the "broad and majestic" definition of liberty: the interest of parents in having their children learn German, *Meyer* v *Nebraska*, 263 US 390 (1923); the interest of parents in being able to send their children to private as well as public schools, *Pierce* v *Society of Sisters*, 268 US 510 (1925); the interest of citizens to associate and to privacy in their associations, *NAACP* v *Alabama*, 357 US 449 (1958); the interest of a woman in deciding whether or not to terminate her pregnancy, *Roe* v *Wade*, 410 US 113 (1972); the interest of married persons in the privacy of their marital relations, *Griswold* v *Connecticut*, 381 US 479 (1965); and the right of unmarried persons to have access to contraceptives, *Eisenstadt* v *Baird*, 405 US 438 (1972); *see also*, *Stanley* v *Illinois*, 405 US 645 (1972); *Bolling* v *Sharpe*, 347 US 497 (1954); *Poe* v *Ullman*, 367 US 497, (Harlan, J., dissenting); *Stanley* v *Georgia*, 349 US 557 (1969); *Olmstead* v *United States*, 277 US 438 (1928) (Brandeis, J., dissenting).

These freedom-proclaiming decisions all stand for the propositions that the Fourteenth Amendment to the United States Constitution protects substantive aspects of liberty embraced in procreation, marriage and married life, and that the "liberty" encompassed by the Amendment protects against "infringement on the individual's *freedom of choice*" in these basic matters, *Kelley* v *Johnson*, ___ US at ___ (emphasis added). This constitutionally protected freedom is among the most basic and most staunchly defended and strongly protected rights envisioned by the Fourteenth Amendment.[2] The leading case regarding the traditional

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[2] The Massachusetts "Body of Liberties", the first Code of Laws established in New England, was established by the Massachusetts General Court in 1641. The "Liberties" recognized the basic right to be free from governmental interference in matters of marriage and family life in its first paragraph of rights:

> 1. . . .no man shall be deprived of his wife or children . . . unlesse it be by vertue or equitie of some expresse law of the Country warranting the same, . . .

sanctity of the marriage and family relationships is *Griswold* v *Connecticut, supra*. *Griswold* struck down a state statute which made the use of contraceptives a criminal offense. In first deciding that marriage and family relationships were social institutions demanding protection, this Court commented extensively about the role of marriage and family in our social consciousness. The Court stated:

> The very idea is repulsive to the notions of privacy surrounding the marriage relationship.
>
> We deal with a right of privacy older than the Bill of Rights — older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions. (Opinion of the Court per Mr. Justice Douglas at 486).

and called the right to marital privacy:

> A right so basic and fundamental and so deep-rooted in our society . . .
>
> A particularly important and sensitive area of privacy . . .
>
> I agree with Mr. Justice Harlan's statement in his dissenting opinion in *Poe* v *Ullman*, 367 US 497, 551-552, 81 S Ct 1852, 6 L Ed 2d 989 (1961): "Certainly the safeguarding of the home does not follow merely from the sanctity of property rights. *The home derives its preeminence as the seat of family life. And the integrity of that life is*

> *something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted Constitutional right . . .*
>
> *The entire fabric of the Constitution and the purposes that clearly unlerlie its specific guarantees demonstrate that the rights to marital privacy and to marry and raise a family are of similar order and magnitude as the fundamental rights specifically protected . . .*
>
> The fact that no particular provision of the Constitution explicitly forbids the State from disrupting the traditional relation of the family — a relation as old and as fundamental as our entire civilization — surely does not show that the Government was meant to have the power to do so, (Concurring opinion of Mr. Justice Goldberg at 491, 495-496). (emphasis added).

That the residency requirement here challenged impinges on the firefighters' "freedom of choice with respect to certain basic matters of procreation, marriage and family life" is beyond question.

This requirement removes from the employee's kitchen table and transfers to the corridors of municipal authority all of his family's rights to choose the school system for their children, *Meyer, Pierce,* to choose the persons they wish to associate with in their neighborhood environments, *NAACP* v *Alabama,* to choose the neighborhoods in which their spouses and children will live, *Stanley* v *Georgia, Dunn* v *Blumstein,* 405 US 330 (1972), *Shapiro* v *Thompson,* 394 US 618 (1969), *Memorial Hospital* v *Maricopa County,* 415 US 250 (1974), to enjoy the rights to a family life free from state interference, *Meyer, Skinner* v *Oklahoma,* 316 US

535 (1942), *May* v *Anderson*, 345 US 528 (1953), *Prince* v *Massachusetts*, 321 US 128 (1942), and their right to privacy, self-identity, autonomy and personal integrity in their marriage and family life, *Roe* v *Wade*, 410 US 113 (1972); *Stanley* v *Illinois; Griswold* v *Connecticut; Eisenstadt* v *Baird; Meyer* v *Nebraska*.

Residence requirements also deprive members of a family unit of other substantial choices that are encompassed in the crucial decision faced by all families as to where the family will live. Although not expressly recognized in opinions of this Court, the choices as to other important family considerations are denied by residency requirements. For example, the choice of a home site mandates the availability of membership in a chosen church parish (whose boundaries are geographic), of convenient medical and health care facilities of high quality, of shopping areas for goods and services and of recreational facilities. Although this Court has not recognized these matters as fundamental rights in specific opinions, Petitioners submit that these matters are as important to families as the others previously recognized by this Court.

Our municipal boundaries must indeed be sacred scratchings in the sand (please see a map of Chicago) to require this sacrifice of those who labor for a living therein.

In this strange case, both of the Plaintiffs that have been discharged, were found guilty — not of having residences outside the city's boundaries — but, of allowing their families to reside out of the city. The evil performed by them thus was in *allowing* their spouses and children a choice in these basic family matters.

4. Petitioners seek the protection of the Fourteenth Amendment not as members of the citizenry at large, but as mere employees of the City's Fire Department.

Petitioners recognize that governmental employers have interests in regulating the activities of employees that differ from the interests possessed in connection with regulation os the activities of the citizenry in general, *Kelley* v *Johnson*, ___ US ___, (1976); *Civil Service Commission* v *Letter Carriers*, 413 US 548 (1973); *Broaderick* v *Oklahoma*, 413 US 601 (1973); *Pickering* v *Board of Education*, 391 US 563 (1968); *Cafeteria and Restaurant Workers Union* v *McElray*, 367 US 886 (1961); *United Public Workers* v *Mitchell*, 330 US 75 (1946).

While it is conceded that governmental employers have wide latitude in the "dispatch of their own internal affairs", *Cafeteria Workers* v *McElroy, supra*, regulations and ordinances intended to regulate governmental employees must still meet Constitutional standards. Cities do not possess raw power over employees, and regulations imposed, at minimum, must bear a rational relationship to some legitimate state interest, *Kelley* v *Johnson*. Further, the state cannot condition public employment on the surrender of Constitutional rights, *Keyishian* v *Board of Regents*, 385 US 589 (1967). Plaintiff-firefighters submit that neither the residency requirement impressed upon them nor the classifications it creates can pass Constitutional muster under the traditional "rational-reasonable" benchmarks of Equal Protection and Due Process.

Neither *McCarthy* nor *Detroit Police Officers*, (the only employee residency cases heretofore before this Court) have contended that residency ordinances lack a rational connection to a legitimate state interest. McCarthy challenged the Philadelphia residency ordinance as violative of his right to interstate travel. In *Detroit Police Officers* the Michigan Supreme Court opinion which was affirmed by this Court merely upheld the right of a municipality to treat police officers bound by peculiar employment conditions differently from

other city employees in a residency ordinance.[3] This Court has yet to have before it the issues herein presented, regarding the irrationality of the City of Chicago's peculiar residency requirement.

The considerations posed by the City in their brief for the Court of Appeals as rational bases are:

> Of course the proximity of emergency personnel to their duty stations is a significant concern. Also especially relevant is the amelioration of substantial unemployment among the City's minority populations. It is *hardly deniable* that an expansion of the City's Police and fire manpower pool from that within the City's boundaries to all of that within the greater Chicago area would have a serious negative impact upon the economic condition of inner city minority groups. Also of

[3] The opinion of the Michigan Supreme Court merely held that treatment of police officers differently from all others in the employ of the city in the residency ordinance was justified by the unique nature of the job of a police officer. The Court noted from proofs at trial that the job of the police officer had "natural distinguishing characteristics" from all other city employees; e.g. the special relationship between the community policed and the police officer, the unique requirement that police officers be armed at all times, the police officer's availability for duty during his off-duty hours and the unique character of the police force as a "semi-military" organization subject at all times to immediate mobilization. Petitioners submit that none of these "naturally distinguishing characteristics" are applicable to the modern day firefighter.

> concern is the effect upon relations between members of the City's uniformed services and inner city population of absentee fire and police departments. (Brief of Defendants at 11-12 emphasis added).

Plaintiffs' Complaint contends that none of these "hardly deniable" justifications can provide even a rational basis for the residency rule, let alone an interest so substantial as to deprive Plaintiffs of fundamental rights.

Plaintiff-firefighters have always maintained that the "emergency personnel" justification claimed — not in responsive pleadings, but only in the above quoted brief — can not provide a rational basis for the requirement. Had the trial court permitted same, Plaintiffs would have denied with proofs, the contentions that Plaintiffs are "emergency personnel".

Petitioners pleaded and intended to prove they are not treated as such for any purpose by the City. Additionally, given the unique shape of the City of Chicago, arbitrarily drawn municipal boundaries of the City, and modern transportation systems and methods, it is irrational to *assume* that firefighters will be closer to their duty stations if required to live within the City limits.

The "amelioration of minority unemployment" argument presented by brief cannot be sustained on a rational basis analysis and was so pleaded. Enforcement of the residency requirement can have only one of two possible effects on any individual firefighter. If the firefighter continues to live within the City, he will maintain his employment and the unemployed in the City will continue unemployed. If, on the other hand, the firefighter chooses to terminate his employment, his position will become vacant, but it is irrational to assume that presently unemployed and unemployable minorities will suddenly acquire the expertise, experience and dedication necessary to be a qualified firefighter and then be hired.

Assuming, *arguendo*, that unemployed members of minority groups would in fact fill the ranks of the Fire Department, the residency requirement would then unconstitutionally restrict the constitutionally protected rights of the newly-hired minority firefighters. This Court in *Hills* v *Gautreaux* has stated that a restriction on low-income housing to the Chicago City limits was unconstitutional because of the national policy of fostering the "*importance of locating housing so as to promote greater choice in housing opportunities*", *Hills* v *Gautreaux*, ___ US ___ (1976). The restriction of housing opportunities to the Chicago city limits in *Hills*, *supra*, was impermissible because:

> The relevant geographic area for purposes of the respondents' housing options is the Chicago housing market, not the Chicago city limits, ___ US at ___.

Hence, hiring minority persons and then subjecting them to a residency requirement would accomplish the same unconstitutional result as did the activities in *Hills*, to wit: the containment of minority homeowners to a geographic boundary. Given either alternative, the result is irrational, arbitrary and capricious.

All of this assumes a finding of fact that such minorities will fill these ranks. These Plaintiffs are denied a right to prove that in Chicago such will not be the case.

The city's proposed justification that resident firefighters will improve relations between minority inner city residents and uniformed municipal employees is also not sustainable under the traditional rational basis analysis as a matter of *fact*. The justification might be applicable to police officers because of their uniquely imposed roles as law enforcement officers. However, the application to modern day firefighters breaks down because the special relationship between a community and its police officers is not applicable to these Plaintiff-firefighters, as a matter of fact.

Residency requirements as imposed in Chicago are not "job related" qualifications or regulations. They do not attempt to regulate the employee's conduct or appearance on the job or conduct or appearance off the job so as to have an arguable effect on job performance, as do hair length and grooming codes, *Kelley* v *Johnson*, or restrictions on partisan political activity, *Letter Carriers*, *Broadrick*. On the contrary, residency requirements exist apart from respondent's method of organizing its fire department and the promotion of safety of persons and property. Residency requirements are not based on the City's policy determination that required residency will encourage efficiency in the fire department but rather exist factually on political altruism.

At best, the residency requirement under this argument is a socio-economic experiment; a desperate attempt to save the City from its process of decline and decay at the expense of city employees. The experiment is too little, too late. Because of its infringement on Plaintiffs' constitutionally protected rights, it is invalid. In *Griswold*, 381 US at 496, Mr. Justice Goldberg noted the limits of a government's power to experiment in social and economic areas where individual rights were involved:

> "(w)hile I quite agree with Mr. Justice Brandeis that . . . 'a. . . State may . . . serve as a laboratory; and try novel social and economic experiments,' New State Ice Co. v Liebmann, 285 US 262, 280, 311, 76 L Ed 747, 754, 771, 52 S Ct 371 (dissenting opinion), I do not believe that this includes the power to experiment with the fundamental liberties of citizens . . ." The vice of the dissenters' views is that it would permit such experimentation by the States in the area of the fundamental personal rights of its citizens. I cannot agree that the Constitution grants such power either to the States or to the Federal Government.

It must also be noted that the regulation of governmental employees has never provided the basis for regulating persons other than the employees themselves. In the case of restrictions on partisan political activity or hair length, no one other than the employee is forced to suffer the deprivation of constitutionally protected rights which are guaranteed to the citizenry at large. In its impact on the employee's spouse and children, residence requirements stand uniquely — without fair explanation — among all the statutes, ordinances, rules and regulations intended to regulate the activities of governmental employees.

5. The basic question presented to this Court is whether a municipal employer can, consistently with the Fourteenth Amendment, condition continuing municipal employment on the surrender of the right of the employee to choose or participate in the choice of the location of the residence of himself, his spouse and his family. Acceptance of municipal employment does not operate as a lifetime waiver of the protections afforded to all citizens by the United States Constitution. Nor can the municipal employer condition the continuation of municipal employment on the wholesale surrender of Constitutional rights, *Keyishian* v *Board of Regents, supra*. This Court is called upon, to reconcile the interest of the City against what are perceived to be fundamental Constitutional rights of these firefighters.

Appellants submit that the proper procedure to be utilized by this Court in reconciling the competing interests was indicated in *McCarthy* v *Philadelphia Civil Service Commission, supra*. In commenting on McCarthy's reliance on cases which he claimed supported his position that the residency requirement impinged his right to interstate travel the Court noted:

> Nor did any of those cases involve a public agency's relationship with its own employees which, of course, may justify greater control than over the citizenry at large. Cf. Pickering v Board of Education, 391 US 563, 568; Civil Service Commission v Letter Carriers, 413 US 548; Broaderick v Oklahoma, 413 US 601. *McCarthy*, ___ US at ___, note 6.

The cases noted in *McCarthy* utilized the "weighing" or "balancing" "of the degree of infringement of the individual's liberty interest against the need for the regulation", *Kelley* v *Johnson*, at ___, concurring opinion of Mr. Justice Powell.

Under this obvious "balancing test" analysis, the Supreme Court has upheld constitutional attacks on laws forbiding partisan political activity by governmental employees, see *CSC* v *Letter Carriers, Broadrick* v *Oklahoma, United Public Workers* v *Mitchell* and hair length restrictions for police officers, *Kelley* v *Johnson*. However, a residency requirement for municipal employees has never been subjected to this kind of constitutional analysis. In neither case were the constitutional issues herein raised presented to this Court and neither case analyzed the residency requirement under the "balancing test" noted in *McCarthy*. Petitioners submit that the residency ordinance of the City of Chicago cannot stand under scrutiny of this balancing test and ask this Court to grant Petitioners a chance to demonstrate this constitutional infirmity with briefs and argument.

6. Petitioners also submit that the District Court and the Court of Appeals erred in not allowing proofs to be taken on the allegations relating to the vagueness of the ordinance and regulations.

Petitioners alleged that the ordinance and regulations were vague on their face and as applied by the Chicago Civil Service Commission and the Chicago Fire Department.

Petitioners realize that vagueness challenges to residency requirements have not been, in the main, greatly successful. However, Petitioners submit that the facts which they intended to demonstrate at trial would have raised vagueness questions which are novel and unique to the City of Chicago's ordinance and the method of its enforcement.

The Court of Appeals has held:

> Appellants' claim that the residency rule is too vague is clearly without merit . . . (Appendix B).

Petitioners alleged in their Complaint that the Fire Department Regulations, especially 61.030, are vague on their face. The regulation simply provides that the "Failure to reside within the corporate boundaries of the City of Chicago" shall be an offense. Nowhere in the regulation or in the ordinance on which it is based, 25 Chicago Municipal Code §30, are "resident", "actual residents of the city" or "reside" in any way defined, limited, explained or clarified. The lack of such definitional clarification renders knowing compliance, or non-compliance, by firefighters haphazard at best and impossible at worst. The ordinances and regulation, on their face, set forth no criteria or guidelines by which individual firefighters can determine whether or not they comply with the regulations and firefighters of ordinary intelligence must necessarily guess at the meaning of "resident", "actual resident" and "bona-fide resident" as used in the Chicago ordinance and Fire Department Rules. Absent such a standard, the ordinance and

regulations are vague on their face and therefore, unconstitutional in that they deprive Petitioners their valuable seniority-accumulated property right in the expectation of continued employment without due process of law.

This lack of definitional guideline makes the ordinance and regulation all the more constitutionally infirm in light of the multitude of confusing and contradictory definitions which have been attached to "residency" by the courts, lawmaking bodies and various administrative agencies. Petitioners were prepared to demonstrate, at trial of this cause, the confusion that exists to them concerning the meaning of residency. By the dismissal on the pleadings, Petitioners were foreclosed from proving the existence of this confusion at a full hearing on the merits.

The ordinance and regulations are also overbroad on their face, and further, impinge on constitutionally protected rights in a manner that is overly broad in their application. Because the restriction, in attempting to regulate behavior, encompasses the constitutionally protected rights of Petitioners *as well as others,* the ordinance and regulations are overbroad.

In the sphere of this definitional void, Petitioners intended to demonstrate at trial that the Defendant Fire Department had, by long standing custom and habit, developed residency criteria which were well known to the members of the Fire Department. The criteria established for meeting the requirement were production of residency proclaiming documents; to-wit:

1. State vehicle license registration card
2. City vehicle license registration card
3. Driver's license

4. Voter's Registration card

5. Receipted utility, tax, water bills, etc., in the firefighters name to the residence shown.

None of these accepted proofs of residency attempted to ascertain the residency of any person other than the individual firefighter. The production of these documents were sufficient to meet the Fire Department's definition of residency for more than 30 years, and the knowledge of said fact was thoroughly established throughout the Fire Department. Plaintiff DePeder, without a change of status, had earlier passed this test of residency, and brought such documents to his last interrogation.

Sometime early in 1974, the Fire Department unilaterally adopted a new procedure for investigating charges of non-compliance with the residency ordinance and regulation. Part of this new procedure was an abandonment of the old residency criteria and the substitution of a newly-drafted series of questions asked in a departmental interrogation session, which for the first time was conducted before a department stenographer, along with a notification of statutory rights and a newly-drafted waiver of the right to counsel. The new criteria delved systematically, for the first time ever, into areas of extremely personal privacy. This new definition took its definition from facts pertaining to persons other than the employees as, for example: where Petitioners' children attend school; to which church Petitioners' families belonged; whether Petitioners owned property outside of Chicago; whether Petitioners' wives owned property outside of Chicago; address on federal and state income tax returns of firefighters (and their wives); number and location of bank accounts; and credit card or charge accounts of firefighters and their wives.

The old definition as established in criteria required by the department was ignored and the firefighters' offers to produce the formerly accepted proofs of residency were refused. The foregoing would have demonstrated that the Fire Department had changed its definition of residency.

Petitioners further intended to demonstrate that the Department's change in definition was never communicated by the Department to the firefighters, either before the new procedure or at any time since. The Department has never promulgated any directive to the firefighters informing them that new definitional criteria had been established, that the old criteria were superceded or what is now necessary to prove compliance with the regulation. What Respondents have, in fact, done was to obfuscate the definition of residency so that knowing compliance is impossible and enforcement can only be arbitrary, capricious and unlawfully discriminatory.

The firefighters had repeatedly asked the Department to establish a clear definition and to furnish them with guidelines as to what would now be sufficient or necessary proofs to demonstrate compliance with the ordinance. Moreover, the Fire Department officer to whom the Civil Service Commission delegated responsibility for its fact finding as to whether Petitioners satisfied the residency requirement did not himself know what the definition of the residency requirement was or how it could be satisfied. This same officer unsuccessfully attempted, with counsel for Petitioners, to contact the Corporation Counsel for the Respondent City in order to work out some standards or guidelines to determine compliance with the requirement.

In addition to the above, Petitioners intended to demonstrate that the triers of the firefighters, the Civil Service Commissioners, did not know the definition of "actual residents of the city" until as late as June 25, 1975, more than eight months after the hearings before said Commission were terminated. The secretary to the Commissioner, Respondent Pounian, requested the definition from the Corporation Counsel on May 14, 1975 and the Corporation Counsel responded by letter dated June 19, 1975 and received June 25, 1975.

Such a state of facts makes knowing compliance impossible and enforcement arbitrary and capricious. For these reasons, the ordinance and regulations are vague and overbroad as applied and work a deprivation of rights without Due Process of law.

7. Petitioners also sought to question the classifications contained within the Chicago ordinance, contending that these classifications are violative of the Equal Protection clause. Petitioners submit that the residency requirement challenged herein cannot withstand Constitutional scrutiny under the traditional "rational basis" test of equal protection and desire to present proofs supporting their contention. Further, Petitioners submit that when a form of state action infringes upon basic rights of individuals as residency requirements do, the City must be required to establish a compelling state interest to sustain the requirement, *Griswold* v *Connecticut, supra*. Petitioners contend that it is impossible to sustain this residency ordinance and the departmental rules under either equal protection test.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

ROBERT P. DANK
Counsel for Petitioner

Dated: August 23, 1976

APPENDIX A

Memorandum Opinion and Order

(The United States District Court
For The Northern District of Illinois
Eastern Division)

This is a civil rights action against Robert J. Quinn, fire commissioner for the City of Chicago, members of the City of Chicago Civil Service Commission and the City of Chicago. Eight plaintiffs, all members of the Chicago Fire Department, challenge the constitutionality of the requirement that all classified civil service employees (with certain enumerated exceptions) must reside within Chicago. Plaintiffs contend that the residency requirement violates the dictates of substantive due process and equal protection. Plaintiffs also argue that their procedural due process rights were violated because the Civil Service Commission held inadequate hearings when certain of the plaintiffs were suspended from duty. The cause is now before the Court on defendants' motion to dismiss. For the reasons set forth below, the motion will be granted in part and denied in part.

I.

In examining the substantive due process and equal protection aspects of plaintiffs' complaint, the Court's initial inquiry is directed at determining what standard of review is to be applied. *Shapiro* v. *Thompson*, 394 U.S. 618 (1969) and *Dunn* v. *Blumstein*, 405 U.S. 330 (1972) establish that a state must show a substantial and compelling reason for establishing residency requirements

which interfere with the fundamental constitutional right to travel. It is clear, however, that the right to travel rationale of *Shapiro* has not been extended to residency as a condition of employment by a municipality for its policemen or firemen. *Detroit Police Officer's Ass'n* v. *City of Detroit*, 385 Mich. 519 (1971), *appeal dismissed*, 405 U.S. 950 (1972); *Ahern* v. *Murhpy*, 457 F.2d 363 (7th Cir. 1972). See also *Wright* v. *City of Jackson, Miss.*, 506 F.2d 900 (5th Cir. 1975). The ordinance in question here thus must only be measured against the rational-reasonable test rather than the strict compelling state interest test.

Measured against the rational-reasonable test, the residency requirement in question here passes constitutional muster. Without question, firemen are emergency personal and undoubtedly it is within the limits of the discretion of the department's administrators to assume that an in-city fireman in many cases could reach an emergency duty station more rapidly than a fireman residing outside the city limits. This assumption is permissible even if many firemen have normal duty stations far distant from their homes. Moreover, other rational purposes exist for requiring city residence, among these are "the promotion of ethnic balance in the community; reduction in high unemployment rates of inner-city minority groups; improvement of relations between such groups and city employees; enhancement of the quality of employee performance by greater personal knowledge of the city's conditions and by a feeling of greater personal stake in the city's progress, . . . and the general economic benefits flowing from local expenditure of employee salaries" *Ector* v. *City of Torrence*, 108 Cal. Rept. 849, 514 P.2d 433 at 436 (1973), *cert. denied*, 415 U.S. 935 (1974).

Additionally, the equal protection clause is not offended by the exemptions contained in the residency requirements. Exemption of appointive and certain specially skilled employees can maximize administrative convenience and increase a limited labor supply for specialized skills. See *Gushi* v. *Rochford*, 74 C 2574 (N.D.Ill., March 6, 1975) (per Decker, J.). Plaintiffs' claims of vagueness and overbreadth are equally without merit. There can be no question as to the meaning of the ordinance and regulations in question. *Gushi* v. *Rochford*, *supra*.

II.

Plaintiffs' claims of denial of procedural due process stand on different footing. *Muscare* v. *Quinn*, 74-1460 (7th Cir., May 21, 1975) holds that summary suspension of safety personnel for the length of time involved here entitles the employee a pre-suspension hearing where the employee is fully informed of the reasons for the proposed suspension and is given a meaningful opportunity to challenge the sufficiency of the claim against him. In the instant case, plaintiffs allege — particularly in paragraphs 15 and 16 — that such an opportunity was not provided. A factual dispute exists as to the nature of the hearings held to date, and such a dispute must be resolved by further motion, stipulated facts, or trial.[1] Particularly, the Court must determine whether plaintiffs were informed of the standards for decision and the evidence against them. The Court will also inquire into whether plaintiffs were allowed to produce and cross-examine witnesses and whether evidence was presented against the plaintiffs *ex parte*. In sum, plaintiffs' complaint is dismissed with respect to claims of denial of substantive due process and equal

[1] Defendants, citing *Huffman* v. *Pursue Ltd.*, 95 S.Ct. 1200 (1975), also argue that since administration hearings are pending, this Court should abstain. *Huffman* only applies to quasi-criminal nuisance proceedings. Since this case is a traditional, completely civil action, abstention is not required. *Monroe* v. *Pape*, 365 U.S. 1967 (1961).

protection (the residency requirement is constitutional) but the motion to dismiss is denied insofar as plaintiffs' claims are based on a purported denial of procedural due process.

Since this opinion has significantly limited the scope of the lawsuit, plaintiffs are hereby directed for the convenience of the Court and the parties to file an amended complaint within twenty (20) days from the date of this opinion specifically directed at the procedural due process claim. All substantive due process and equal protection claims are preserved for the purposes of appeal. Additionally, the amended complaint must demonstrate that this action is not moot with respect to procedural due process issues even though the suspended officers have been reinstated, apparently with back pay. Defendants will be granted twenty (20) days to answer the amended complaint when filed.

IT IS SO ORDERED.

ENTERED:

/s/ R. W. McLaren
United States District Judge

Dated: September 4, 1975

APPENDIX B

Order

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

(Argued May 28, 1976)

Before: Hon. Tom C. Clark, Associate Justice*; Hon. Thomas E. Fairchild, Chief Judge and Hon. Walter J. Cummings, Circuit Judge.

The Court, after reading the briefs, addressing itself to the record, and hearing oral argument on behalf of appellants, has concluded that the decision of the Supreme Court in *McCarthy* v. *Philadelphia Civil Service Comm.*, March 22, 1976, 44 U.S.L.W. 3530, requires affirmance of the judgment appealed from.

This Court announced its decision in open court after hearing counsel for the appellants. Counsel contended that certain rights of appellant firemen employees were not considered in *McCarthy, i.e.*, the right not to have to sacrifice one's marriage and the right to select a home; that the lack of an exception for hardship cases renders a residency condition unconstitutional. These are all, however, subsumed in the matters which clearly must have been considered by the Supreme Court in *McCarthy*. Appellants' claim that the residency rule is too vague is clearly without merit, as is appellants' conclusion that they are deprived of due process as a result of the enforcement of the residency rule.

The Clerk of this Court is directed to enter judgment afirming the judgment appealed from.

---

*Honorable Tom C. Clark, Associate Justice (Retired) of the Supreme Court of the United States is sitting by designation.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-283

PAUL R. BUTE, WILLIAM FEDOR, GEORGE DAVID DE PEDER, RAYMOND G. PATRAS, THOMAS R. BURNS, RUSSELL J. LEAVY, BERNARD J. SCHROEDER and JAMES JAEGER,

Petitioners,

vs.

ROBERT J. QUINN, as Fire Commissioner for the City of Chicago, and WILLIAM E. CAHILL, REGINALD DU BOIS, QUINTON J. GOODWIN and CHARLES A. POUNIAN, as Members of the Chicago Civil Service Commission, and THE CITY OF CHICAGO, a Municipal Corporation,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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Midwest Law Printing Co., Chicago 60601, FInancial 6-3988

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (App. A of Petition) and the opinion of the United States Court of Appeals for the Seventh Circuit (App. B of Petition) have not been reported.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Whether the municipal employee residency requirement is rationally related to a proper governmental interest of the City.
2. Whether the municipal employee residency requirement denies petitioners any fundamental rights.
3. Whether the municipal employee residency ordinance is unconstitutionally vague.
4. Whether the municipal employee residency ordinance is unconstitutional because it includes no provision for exceptions.

ORDINANCE AND REGULATIONS INVOLVED

The ordinance, Municipal Code of the City of Chicago, Chapter 25, Section 25-30, and the Regulation of the Chicago Fire Department, Section 51.116, are set forth in the Petition at pages 3 and 4.

STATEMENT

The statement set forth in the Petition at pages 4 through 8 adequately describes the case.

ARGUMENT

I.

THE MUNICIPAL RESIDENCY REQUIREMENT IS RATIONALLY RELATED TO SIGNIFICANT AND PROPER GOVERNMENTAL PURPOSES.

Petitioners assert that they are denied equal protection of the laws by the City of Chicago's requirement of residence as a condition of municipal employment. They argue that a residency requirement is not rationally related to any proper governmental interest. This argument was recently rejected by this Court in a review of the Philadelphia residency ordinance in *McCarthy v. Philadelphia Civil Service Commission*, 424 U.S. 645 (1976). In the *McCarthy* opinion this Court noted that this kind of ordinance was held not irrational in *Detroit Police Officers Association v. City of Detroit*, 405 U.S. 950 and also cited with approval *Wardwell v. Board of Education of Cincinnati*, 529 F.2d 625 (6th Cir., 1976), which found several rational bases for a Cincinnati residence requirement for public school teachers. Other recent decisions which have acknowledged a rational relationship between municipal employee residence requirements and one or more legitimate state purposes include *Wright v. City of Jackson Mississippi*, 506 F.2d 900 (5th Cir. 1975); *Ector v. City of Torrance*, 10 Cal. 3d 129, 514 P. 2d 433 (1973, cert. denied, 415 U.S. 935, and *Salt Lake City Fire Fighters Local 1645 v. Salt Lake City*, 22 Utah 2d 115, 449 P. 2d 239 (1969).

In this case respondents have identified several specific and significant interests which are advanced by the requirement of residency as applied to firemen. These include the reduction of unemployment among inner-city minority groups, relief from the aggravation

of racial resentments caused by employment of an absentee force in the City's uniformed services, and the ready availability of resident firefighters in the event of major fire emergencies.

Petitioners are particularly critical of the claim that the residency requirement reduces urban minority unemployment. (Petition, pages 19 through 20.) It is apparent, however, that recruitment of fire department personnel from the entire Greater Chicago area, which an abandonment of the residency requirement would entail, would mean that fewer city residents, including fewer of the city's minority residents, will have access to this employment. Nor are respondents able to accept petitioners' suggestion that minority group members may be unemployable or lack the expertise, experience and dedication necessary to become qualified firefighters and will therefore gain no advantage as a result of recruitment exclusively from within the City.

Petitioners also deny that a resident fire department is helpful in avoiding the antagonisms which are likely to exist between uniformed municipal employees and urban racial groups. (Petition, page 20) However the disposition of some inner city populations to regard a city fire department substantially composed of suburbanites as a sort of mercenary army is not a novel notion. In *Krzewinski v. Kugler*, 338 F. Supp. 492 (D.C. N.J. 1972) a three judge district court upheld a residence rule as applied to both fire and police personnel on precisely this basis. That court declared at 338 F. Supp. 500, 501:

> To the community, the fire department is another link in the chain of law enforcement. Firemen wear uniforms which fact, in the eyes of those dissatisfied with the establishment, makes the firemen part of a paramilitary group determined to do them harm. Were firemen also to live outside the municipality,

> the tension which already exists might easily be heightened. Investigations by the fire department are not at all uncommon, and criminal sanctions are frequently brought into play when local fire ordinances are enforced. . . . Firemen as well as police are routinely harassed, attacked and even shot at during the course of their duty throughout the nation's cities. Whatever this Court's attitude might be, urban communities clearly choose to put firemen and police in the same class. The need to develop community rapport and to put an end to misunderstanding and intolerance is therefore apparently just as compelling a state interest with regard to firemen as with policemen.

Petitioners' rejection of the residence ordinance as a "socio-economic experiment" which they characterize as "too little, too late" (Petition, page 21) is inaccurate and cavalier. The residence requirement has been a part of Chicago's civil service code for more than 50 years and is therefore hardly experimental. And increased minority employment in the civil service and the improvement of community relations through police and fire departments identifiable with the community are purposes which should not be discarded simply because they do not bring complete solutions of urban problems.

Petitioners also argue that if given an opportunity they would refute the claim that resident firemen afford greater emergency protection for the city by proof that firemen are not emergency personnel. (Petition, page 19) Plainly if firemen are not "emergency personnel" then the expression is without meaning. Moreover, petitioners' assertion in this Court that they intend to prove firemen not to be emergency personnel is an intention never explained to the district court or the court of appeals.

For these reasons it is submitted that the City's residence ordinance is rationally and reasonably related to governmental interests of great importance.

II.

THE RESIDENCY REQUIREMENT DENIES PETITIONERS NO FUNDAMENTAL RIGHTS.

Petitioners argue that the City's requirement of residency for municipal employment deprives them of "freedom of choice with respect to certain basic matters of procreation, marriage and family life." (Petition, page 15.) Few would disagree with petitioners' views regarding the high value of marriage and family life but respondents do deny that the residency ordinance denies or limits any matters basic to the family or marital relationship. Contrary to their suggestions petitioners simply do not demonstrate that the residency ordinance invades rights to privacy, to have children, to enjoy family life free of interference, to associate with whomever they wish, to send their children to private or parochial schools, to join or attend the church of their choice, or to utilize any shopping, health care or recreational facilities they wish. Nor does it compel them to remain in any particular neighborhood or type of neighborhood or restrict them from entry into a community of any ethnic, racial, cultural or social type they might choose. Thus, assuming that many of these interests are basic and do involve "fundamental rights," it is nevertheless clear that petitioners can demonstrate no denial of the rights they mention.

It is submitted that the contentions of petitioners are in substance identical with those presented by the appellant in *McCarthy v. Philadelphia Civil Service Commission*, 424 U.S. 645 (1976) (discussed *supra*, page

3.) As the opinion of the Commonwealth Court of Pennsylvania (19 Pa.C. 383, 339 A. 2d 634 (1975)) reveals, McCarthy, a Philadelphia fireman, maintained a residence in New Jersey where he spent as much time as he did at his mother's home in Philadelphia. He continued the marital relationship with his wife who lived upon property which the couple owned in New Jersey. He was the sole support of his wife and his children who attended school in New Jersey. McCarthy contended that Philadelphia's residence ordinance, pursuant to which he was discharged upon proof of these facts, was unconstitutional. This Court in upholding the constitutionality of the ordinance declared:

> In this case appellant claims a constitutional right to be employed by the city of Philadelphia *while* he is living elsewhere. There is no support in our cases for such claim. [424 U.S. 646 646-7]

The interests asserted by petitioners herein as infringed by the Chicago residence ordinance are the same as those claimed by McCarthy. But whether these interests are viewed as subsumed within the fundamental constitutional right to travel or are characterized as family or marital rights it is submitted the petitioners' claim of a denial of equal protection is without merit.

III.

THE CITY'S MUNICIPAL RESIDENCE ORDINANCE IS NOT VAGUE.

Section 25-30 of the Municipal Code of the City of Chicago provides:

> All officers and employees in the classified civil service of the City shall be actual residents of the City. Any officer or employee in the classified civil service of the City who shall fail to comply with the provisions of this section shall be discharged from the service of the City in the manner provided by law.

Petitioners contend that this ordinance is so vague that its enforcement results in a denial of due process because "actual resident" is an undefined term. (Petition pages 23 through 28)

The meaning of the term "resident" has been considered in a variety of contexts by Illinois courts. Although modern living habits vary in many respects the statement of the court in *Hughes v. Illinois Public Aid Commission*, 2 Ill. 2d 374 (1954) provides a clear and functional definition to which Illinois courts have consistently adhered. In *Hughes* it was stated:

> Two elements are necessary to create a residence, (1) bodily presence in that place and (2) the intention of remaining in that place; neither alone is sufficient to create a legal "residence." [2 Ill. 2d 380]

See *Garrison v. Garrison*, 107 Ill. App. 2d 311 (1969) and *Sisters of the Third Order of St. Francis v. Groveland Township*, 7 Ill. App. 2d 278 (1972). This definition concededly does not provide a mathematical standard against which items such as the number of days per week in the city, the dwelling place of the employee's family, the frequency and duration of visits to out-of-the-City vacation homes and a multitude of other such factors can be precisely measured in determining compliance with the ordinance. However, respondents submit that this definition has supplied petitioners and other municipal employees with as reliable and clear a definition as is feasible.

Petitioners also complain that respondents abandoned long standing residency "criteria" such as auto registration cards, driver's licenses, voter's registration cards and receipted utility bills. (Petition, pages 25-27) However, these documents have never been the "criteria" by which residency is determined but are rather merely evidence through which residence may be

proved. Unfortunately such documents reflect little more than the answers stated in applications and they may therefore be unreliable evidence. It is for that reason that questions relating to such matters as church memberships, school enrollment of children and ownership of suburban residential property were asked of employees as additional and more accurate indicators of presence and intent to remain within the City. Plainly this constituted no alteration or concealment of the standards applicable in determining residency and therefore did not deprive petitioners of due process.

IV.

THE RESIDENCE ORDINANCE IS NOT UNCONSTITUTIONAL FOR THE FAILURE TO PROVIDE FOR EXCEPTIONS.

Petitioners also argue that the ordinance is unconstitutional because it does not make provision for excepting employees under some circumstances from the requirement of living within the City. (Petition, pages 10 through 12.) Petitioners have not indicated either by their argument or by citation of authority what constitutional guarantee is violated by this omission. It must be conceded that this ordinance will be experienced by some as more inconvenient than by others. The same criticism could surely be made of virtually every statute and ordinance. Yet, it is submitted that this fact does not render a measure unconstitutional.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petition for a writ of certiorari should be denied.

Respectfully submitted,

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November 18, 1976

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-283

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF OF PETITIONERS

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF OF PETITIONERS

ROBERT P. DANK, on behalf of Petitioners, respectfully submits this Reply Brief to the Court pursuant to Supreme Court Rule 24(4) in further support of the Petition for Certiorari to the United States Court of Appeals for the Seventh Circuit.

Petitioners take exception to Respondents' assertion in their Brief in Opposition (page 5) that Petitioners have never explained to the district court or to the Court of Appeals their intention to prove that Chicago firefighters are not emergency personnel, for the reason that it is untrue. Petitioners' Complaint, filed with the District Court stated:

> 19. The foregoing classifications are without any rational justification in relation to any proper governmental function or purpose of the Defendants, in that, among other things:
>
> a. The location of one's residence is not now and has never been, in practice, a determining factor in work assignment for any of the Plaintiffs or members of their class, and the Defendant Fire Commissioner has assigned firemen to work stations indiscriminately and at great variance and distances from residences.
>
> b. The Defendant Fire Commissioner has on occasion, as a matter of disciplinary punishment, intentionally assigned firemen to locations great distances from their residence.
>
> c. The operation of the Fire Department by the Defendant City and Defendant Fire Commissioner is of such a degree of sophistication that manpower requirements are easily scheduled and of such availability in an on-duty position, as to meet all emergency conditions.

Petitioners have never abandoned their intent to demonstrate that Chicago firefighters while off duty are not emergency personnel. The issue was briefed in Petitioners' Brief in Opposition to Defendants' Motion to Dismiss (pages 2-4, 8-9), in Petitioners' Brief on Appeal to the Court of Appeals (pages 8-9, 11, 25-26, 42) and in Petitioners' Reply Brief to the Court of Appeals (pages 14-15).

It has always been Petitioners' intention to demonstrate at trial that, unlike the police officers in *Detroit Police Officers Association* v *City of Detroit*, 385 Mich 519, 190 NW2d 97 (1971), *appeal dismissed*, 405 US 950 (1972), who were found by the trial court to be required to be armed and able to perform their law enforcement duties twenty-four hours a day, Chicago firefighters are not "on duty" after they have completed their assigned tour of uniformed duty. Although Petitioners are admittedly *emergency personnel* during their on-duty hours, Respondents improperly characterize that term as including periods of times not in contention in this action.

Respectfully submitted,

ROBERT P. DANK
Counsel for Petitioners

Of Counsel:
HARRY K. GOLSKI

Date: November 24, 1976